RANHILL BERSEKUTU SDN BHD

v.

KONSORTIUM LAPANGAN TERJAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[CIVIL SUIT NO: D6-22-2908-1999]
2 JANUARY 2001

CIVIL PROCEDURE: *Stay of proceedings - Arbitration clause - Whether a dispute as to debt existed for arbitration - Admission of debt in collateral proceedings - Whether negated element of dispute - Whether application for stay should be granted*

By an agreement dated 14 December 1996, the plaintiff was appointed as the defendant's consultants for a construction project. By virtue of cl. 23 of the agreement any dispute between the parties concerned in relation to the agreement shall be first referred to arbitration.

The plaintiff filed an action to recover its fees amounting to RM13,600,226.25.

The defendant disputed the claim and applied for a stay of proceedings on the ground that a dispute existed and accordingly it should be referred to arbitration.

The senior assistant registrar refused to grant the stay on the ground that the defendant had made admissions of the debt in other collateral proceedings filed in court. Hence, there was no dispute between the parties and therefore there was no necessity to refer the matter to arbitration. Dissatisfied, the defendant appealed.

Held:

[1] Before a judge can consider his power to grant stay proceedings under s. 6 of the Arbitration Act 1952 the judge must be satisfied that three conditions exist: (i) that there is a dispute; (ii) that the applicant has not taken any other action besides the request for a stay; and (iii) that the applicant willingly submits to arbitration proceedings.

[2] The defendant had satisfied the court of the first two conditions above. However, it failed to satisfy the court that the plaintiff's sum of RM13,600,226.25 was a disputed debt. On the contrary, there were admissions of the debt made by the defendant in its earlier affidavit for winding-up proceedings. There was also a letter written by the defendant's

Chief Executive Officer to the plaintiff confirming the outstanding sum, with an undertaking to make progressive payments within a specified period.

[3] The admissions made by the defendant in the collateral proceedings filed in court were admissions made in the face of court records and were well within the ambit of s. 18 of the Evidence Act 1950 as clear and unambiguous statements made by the party in proceedings. The admissions therefore are conclusive evidence and admissible to negate the element of dispute or as otherwise provided for under O. 27(3) of the Rules of the High Court 1980. Accordingly, the defendant was estopped from pleading or alleging that there was a dispute between the parties warranting a reference to an arbitrator and/or a stay of proceedings.

[4] The defendant raised the plea of dispute in frivolity, only to delay the plaintiff's claim to a speedy process of the court.

[Appeal dismissed.]

Case(s) referred to:
Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 6
Companies Act 1965, s. 176
Evidence Act 1950, s. 18
Rules of the High Court 1980, O. 27(3)

For the plaintiff/respondent - Ashok K Raman (R Rajasurian with him); M/s Abu Talib Shahrom & Zahari
For the defendant/appellant - Joseph Yeo; M/s RR Sethu

Reported by Usha Thiagarajah

JUDGMENT

KL Rekhraj J:

The defendants, pursuant to an agreement dated 14 December 1996, agreed in the appointment of the plaintiffs as the defendants consultants on terms *inter alia:*

(a) that the consultant's fees shall comprise the consultant's total entitlement to the payment for their services at 2.5 per cent of the total construction cost; and to be paid as provided for in the schedule of payment shown in the appendix;

(ii) that **if a dispute** or difference **arose** between the employer (the defendant) and the consultant (the plaintiff) in regard to any matter or things of whatsoever nature arising out of this agreement, then either party shall give to the other **notice in writing of such dispute** or difference and such dispute or difference shall be referred to the mediation of a person to be agreed upon between the parties or failing such agreement within 28 days to an arbitrator for arbitration.

The plaintiffs filed a writ on 30 October 1999, in the recovery of **their fees in the sum of RM13,600,226.25 sen** together with interest at the rate of 8 per cent per annum from the date of the writ to the date of realisation and costs of the proceedings.

The defendants upon the service of the writ filed an urgent application *ex parte* for leave to enter conditional appearance and for other ancillary reliefs on grounds as supported by the affidavit of Mr Oo Gin Huat – the Technical Director in that:

(i) the defendants are disputing the plaintiffs claim;

(ii) the contract under which the plaintiff's claim, carries a clause No. (23) of the conditions of the contract; a comprehensive dispute resolution clause for initial mediation and subsequent arbitration ...; and in addition thereto, the defendant's have a counterclaim against the plaintiffs;

(iii) that the defendants are able, ready and willing to refer the dispute for resolution under the terms of the contract; and

(iv) that the defendants intend to apply to the court for a stay of the present proceedings under s. 6 of the Arbitration Act 1952.

The senior assistant registrar upon hearing the *ex parte* application refused to grant stay on the grounds that the defendants had made admissions of the debt in other collateral proceedings filed in court – *vide* Suit No: D3-28-606-98; and as such there was no dispute between the parties requiring any reference to any mediation or arbitration.

The defendants being dissatisfied appealed to the judge in chambers against that decision. At the hearing of the appeal, I dismissed it with costs by simply relying on the interpretation of cl. (23) – the Dispute Resolution; and on the admissions made by the defendants in the other collateral proceedings, thereby taking out "the element of a dispute," if any.

The Dispute Resolution reads, "**If a dispute** or difference **arises** ... in regard to any matter ... arising out of this agreement, then either party ... to mediation, or failing such agreement ... to an arbitrator for arbitration.

In other words, before a judge can consider his power to grant stay proceedings under s. 6 of the Arbitration Act 1952; which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, **and the court, if satisfied** that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.

the judge must be satisfied of the fulfilment of three conditions:

(a) that **there is a dispute**;

(b) that the applicant has not taken any further step in the proceedings other that to ask for stay;

(c) that the applicant is **ready** and willing to do all that is necessary in the conduct of the arbitration proceedings.

Once these conditions are satisfied, then the onus shifts on the other party to convince the court that there is a sufficient reason as to why the matter should not be referred to arbitration or mediation. Here the onus is on the plaintiff to satisfy the court that it si proper to refuse the application for the stay (*Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, following the case of *Heyman v. Darwins Ltd* [1942] AC 356).

Whilst the defendant applicants have satisfied the court of the two other requisite conditions (b) and (c) above, the defendant had failed to show to the court to its satisfaction that the plaintiffs claim in the sum of RM13,600,226.25 sen was a disputed debt, *albeit*, on the contrary **there were admissions of the debt** made by the defendant's director, Encik Zolkiffli bin Hj Ismail, in his affidavit filed on 1 March 1999, in the Winding-up Proceedings D3-28-606-98; whereby an exh. KLT-38, as annexed thereto, a letter dated 26 February 1998; from the defendants addressed to all its creditors proposing a scheme of arrangement for their consideration under s. 176 of the Companies Act 1965 (Appendix 2(b)) showing the plaintiffs being as **one of the unsecured creditors** for the total sum of **RM12,843,196**.

Again, the defendants by their letter dated 8 January 1999, under the hand of its Managing Director cum the president and Chief Executive Director had confirmed to the plaintiffs of the outstanding sum then due and standing at RM12,296,694.25 sen and undertaking to pay the said sum progressively towards full settlement by **30 June 2000**; and in the penultimate sentence of that letter said **"We are not aware of any circumstances or events which are likely to prevent us from repaying the said balance outstanding by that date."**

These admissions by the defendants and having been made in the collateral proceedings filed in court, are **admissions** made in the face of the court records and are well within the ambit of s. 18 of the Evidence Act 1950; as clear and unambiguous statements made by the party in proceedings and as such are conclusive evidence, admissible to negate the element of **dispute**, or as otherwise as provided for under O. 27(3) of the Rules of the High Court 1980; and the defendants are now accordingly estopped from pleading or alleging that there is a dispute between the parties, and/or warranting a reference to the arbitrator or mediator; and or in the stay of proceedings.

I am satisfied that **there is no dispute** and the defendants are raising the **plea of a dispute** in frivolity, to delay the plaintiff's to speedy process of the court. After all the defendant's are still at liberty to raise whatever defences or counterclaim they may have in the proceedings before this court. Appeal dismissed with costs of RM8,000.